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LETTER DATED 17 JANUARY 1998 FROM THE PERMANENT REPRESENTATIVE OF IRAQ TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

On instructions from my Government, I have the honour to transmit herewith a letter from Mr. Mohammed Said Al-Sahaf, Minister for Foreign Affairs of the Republic of Iraq, setting forth Iraq's position on the work programme proposed by the secretariat of the United Nations Compensation Commission, which it is proposed to complete within the five years from 1998 to 2003.

I should be grateful if you would have this letter circulated as a document of the Security Council.

(Signed) Nizar HAMDOON
Ambassador
Permanent Representative

Annex

Letter dated 13 January 1998 from the Minister for Foreign Affairs of Iraq addressed to the Secretary-General

With reference to the work programme presented by the secretariat of the United Nations Compensation Commission in document S/AC.26/1997/WP.1 of 27 August 1997, the Government of the Republic of Iraq would like to set forth its position on the proposed programme, which the secretariat hopes to complete in the five years from 1998 to 2003, particularly since the basic characteristics and goals of the plan have been clarified.

The secretariat has justified proposing its work plan on the basis of the aforementioned programme on the following grounds:

1. Paragraph 2 of the introduction states that the work programme presupposes, under the rubric of the Provisional Rules for Claims Procedure, or the Rules, that a specific operational framework and set of standard operating procedures should apply to claims in categories "D", "E" and "F". While the work programme does include the implementation schedule for category "C" claims, the conceptual foundation does not apply to category "C" claims, which have been brought to an advanced stage in the claims process using mass claims processing techniques.

2. Paragraph 3 states that the work programme is built upon a distinct understanding of the roles and responsibilities in the claims process of the panels of Commissioners, the secretariat and valuation and other experts.

3. Paragraph 4 of the introduction states that the panels will avoid a specific item-by-item review of claims. Rather, the panels will determine global legal issues and decide on valuation and processing methodologies for the resolution of similar claims. The panels will then supervise the secretariat's implementation of those methodologies.

On the basis of the foregoing, we should like to make the following remarks:

The role of the secretariat is clear and well-defined, as reflected in article 14 of the Provisional Rules for Claims Procedure of the United Nations Compensation Commission. It needs no clarification, since article 14 states:

> 1. The Secretariat will make a preliminary assessment of the claims received in order to determine whether they meet the formal requirements established by the Governing Council. To this end the Secretariat will verify:
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> (a) that the claims have been submitted on the appropriate claim forms with the required number of copies, and in English or with an English translation;
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> (b) that the claims contain the names and addresses of the claimants and, where applicable, evidence of the amount, type and causes of losses;

(c) that the affirmation by the Government has been included in respect of each consolidated claim stating that, to the best of the information available to it, the claimants are its nationals or residents, and that it has no reason to believe that the information stated in the claims is incorrect;

(d) that all required affirmations have been given by each claimant.

2. In the case of claims of corporations and other legal entities the Secretariat will also verify that each separate claim contains:

(a) documents evidencing the name, address and place of incorporation or organization of the entity;

(b) evidence that the corporation or the legal entity was, on the date on which the claim arose, incorporated or organized under the law of the State the Government of which has submitted the claim;

(c) a general description of the legal structure of the entity;

(d) an affirmation by the authorized official for each corporation or other entity that the information contained in the claim is correct.

From the foregoing it is clear that the role of the secretariat is restricted to making a preliminary assessment of the claims received in order to determine whether they meet the formal requirements: that the claims have been submitted on the appropriate claim forms, that the claims contain the names and addresses of the claimants, and that all required affirmations have been given by each claimant. However, the programme proposed by the secretariat diminishes the jurisdiction of the panels of Commissioners by requiring them to avoid a specific item-by-item review of claims and decide on valuation and processing methodologies that will be implemented by the secretariat. This is a responsibility of the panels of Commissioners that has been transferred to the secretariat by the programme. Thus the secretariat, contrary to its responsibilities as set forth in article 14, will undertake one of the duties of the panels of Commissioners, which were clearly set forth in article 38 (Review by Commissioners of other claims) of the Rules.

With respect to claims received under the Criteria for Processing of Claims of Individuals not Otherwise Covered; Claims of Corporations and Other Entities; and Claims of Governments and International Organizations (S/AC.26/1991/7/Rev.1), the following procedures will be used:

(a) In so far as possible, claims with significant common legal and factual issues will be processed together;

(b) Panels may adopt special procedures appropriate to the character, amount and subject-matter of the particular types of claims under consideration;

(c) Each panel will complete its review of any claim or group of claims and report in writing through the Executive Secretary to the Governing Council within 180 days of the date the claims in question are submitted to the panel,

except for any unusually large or complex claims referred for detailed review, as described below. Each panel will make its recommendations on the basis of the documents submitted, taking into account the preliminary assessment conducted in accordance with article 14, any other information and views submitted in accordance with article 32 and any information submitted in accordance with article 34;

(d) Unusually large or complex claims may receive detailed review, as appropriate. If so, the panel considering such a claim may, in its discretion, ask for additional written submissions and hold oral proceedings. In such a case, the individual, corporation, Government, international organization or other entity making the claim may present the case directly to the panel, and may be assisted by an attorney or other representative of choice. The panel will complete its review of the case and report in writing through the Executive Secretary its recommendations to the Governing Council within twelve months of the date the claim was submitted to the panel;

(e) Each panel will report in writing through the Executive Secretary to the Governing Council on the claims received and the amount recommended to be awarded for each claimant. Each report will briefly explain the reasons for the recommendations.

It is therefore evident that the programme clearly intends to give the secretariat powers that are unrelated to its work and assign to it duties for which it is not responsible under the Rules. This is clear from paragraph 5 of the introduction to the work programme, which states that the secretariat will report on claims submitted as required by article 16, implement the methodologies established by the panels to deal with groups of claims, and inform the panels of the results of that implementation.

Paragraph 6 of the introduction states that in order to minimize the need for the panels to request additional information from either the claimants or the Government of Iraq, the secretariat will prepare the claims for submission to panels of Commissioners. This will free the panels to focus their efforts during the review period allotted by the Rules on substantive issues and decisions.

Paragraph 7 provides that external valuation and other experts will assist the panels with the valuation of losses. Such experts may also assist the secretariat in preparing claims for submission to panels.

In section B (Standard operating procedures), paragraph 9 states that various other operating procedures will require elaboration. They include procedures concerning the relationships between the secretariat and the panels of Commissioners, the Commission and the claimants, and the Commission and external experts.

Paragraph 12, entitled "Article 14 assessment", states that the secretariat may at the same time further prepare the claims for submission to panels. This may involve requesting additional information or evidence from various sources, including the claimants. In that effort, the secretariat may seek assistance from valuation and other experts.

It is extremely clear that the secretariat is attempting to acquire powers and carry out duties other than those provided for the secretariat in the Rules, and specifically those of article 14, which we have quoted above. These additional duties include the following:

(a) The plan or programme was based on the presupposition set forth in its paragraph 2, namely, that a specific operational framework and set of standard operating procedures should apply to claims in categories "D", "E" and "F", and that the conceptual foundation would not apply to category "C" claims.

This presupposition on the part of the secretariat has no legal basis, since we are dealing with claims for compensation which must meet certain conditions - namely, that they are for damage, that this damage was caused directly by military operations and that it occurred within a certain period. There is therefore no specific operational framework or set of standard operating procedures for carrying out valuation in either the Rules or the decisions of the Governing Council of the United Nations Compensation Commission. The secretariat has thus fabricated this presupposition in order to achieve a political aim. This involves heavily damaging Iraq and expediting the settlement of a large number of claims for compensation without observing any procedures such as screening for fictitious claims or examining authentic claims in accordance with the criteria stipulated in the relevant Security Council resolutions. Were it not for this fabricated presupposition, the secretariat would not have been able to move its plan forward to the next stage, as we shall demonstrate. It is clear that the purpose of this fabricated presupposition is to institute procedures and allow the secretariat to acquire powers and duties it would not have without the programme, since the Rules do not accord it the powers mentioned in the programme.

It is clear from the foregoing that the programme lacks the correct legal and procedural basis for operations, since it was not issued by either the Security Council or even by the Governing Council of the United Nations Compensation Commission for the purpose of empowering the secretariat to undertake these duties, which are judicial, quasi-judicial or arbitrational, and fall within the mandate of the panels of Commissioners.

(b) The secretariat will apply valuation and processing methodologies for the resolution of similar claims. Such work falls within the mandate of the panels of Commissioners and is no concern of the secretariat. The secretariat is therefore attempting to take on these duties in order to deal with claims administratively, without observing any legal principles that would oblige it to examine claims on an item-by-item basis in order to ascertain that the damage claimed was caused directly by military operations or examine the proof in order to determine the causal relationship between the direct damage and the military operation. This is what is stated in paragraph 4 of the programme.

(c) It is strange that the secretariat justifies using methodologies that will permit it to examine claims, request additional information, choose not to request any information while relying solely on the information given in the claims, and evaluate claims on the grounds that this will minimize the need for the panels to request additional information from either the claimants or the Government of Iraq. This raises the question of why the secretariat should wish

to minimize the need for the panels of Commissioners to seek additional information when such information should be sought by the panels only if they need it to arrive at the truth. Minimizing the acquisition of such information will certainly lead to confusion, and it will be easy for claimants to submit fraudulent and exaggerated claims, as many of them do. It also means that the principles of law and equity will not be observed when such claims are examined, leading to the taking of decisions that are not founded on complete and correct information.

(d) Paragraph 7 of the programme states that external valuation and other experts (to be appointed to work with the secretariat) will assist the panels with the valuation of losses, and that they may also assist the secretariat in preparing claims for submission to panels.

These new powers and duties will divest the panels of Commissioners of their most fundamental duty, namely, the assessment of losses, which will be given to the secretariat and the "valuation experts" working with it. However, article 19 of the Rules stipulates that when Commissioners are appointed, they will be experts in fields relating to the claims they are to assess. Article 36, subparagraph (b), of the Rules provides that the Commissioners alone have the right to request additional information from any other source, including expert advice, as necessary. As a consequence, they alone are entitled to decide whether or not the information and affirmations submitted are sufficient. If the secretariat undertakes this task, it will deprive the Commissioners of their duties and grant the secretariat powers and a jurisdiction that were not provided for in the Rules. On the contrary, what was provided for was quite the opposite. These duties lack any legal or procedural basis if they are ordered or carried out by the secretariat.

Paragraph 9 of the programme sets out the aim of elaborating new procedures concerning the relationships between the secretariat and the panels of Commissioners, the Commission and the claimants, and the Commission and external experts. The Rules clearly regulate these relationships, just as they define the duties of the secretariat, the panels of Commissioners and all the other parties. This forces us to ask why the secretariat should wish to review the procedures which regulate the relationships between the parties mentioned above. It wishes to review these procedures in order to give itself wider powers to influence the jurisdiction and duties of the panels of Commissioners in assessing claims and take on the objective evaluation of claims, something that is not permitted by the Rules. What is permitted is the assessment of the claims received in order to determine whether they meet the formal requirements for the submission of claims set out in article 14, without going into their substantive details. If the proposed new procedure is adopted, the secretariat will take on a role different from that laid down for it in the Rules, without any fundamental authorization from the Security Council. The great danger inherent in the new provisions set out in the programme is thus obvious, and it is for this reason that the secretariat's proposal constitutes a new political decision. Here, we cannot discount the influence of certain States, exerted either by their nationals serving in the secretariat or their ambassadors who are members of the Governing Council of the United Nations Compensation Commission. The danger lies in the fact that the new approach reflected in the programme will lead to the taking of decisions on compensation which are

inconsistent with the most basic legal concepts and rules of justice and equity. Decisions on compensation will be taken on this procedural basis and within a very limited time-frame that in no way corresponds to the minimum amount of time necessary to study such an enormous volume of claims. These claims must be studied properly and impartially, and fair and balanced decisions must be taken. This goal cannot be achieved if the panels of Commissioners do not consider, or are given insufficient time to consider, all the facts, documents and evidence relating to the claims.

(e) The new and most dangerous principle to appear in the programme is mentioned in paragraph 12, entitled "Article 14 assessment". This makes it clear what game the secretariat is playing. Whereas article 14 of the Rules, as has been made clear above, sets forth the duties of the secretariat, which may be summarized as making an assessment of the claims in order to determine whether they meet the formal requirements for submission, paragraph 12 of the programme states that the secretariat may at the same time further prepare the claims for submission to panels. This may involve requesting additional information or evidence from various sources, including the claimants. In that effort, the secretariat may seek assistance from valuation and other experts. This means that the secretariat wishes to do the following:

(i) Request additional information or evidence from various sources. This is one of the duties of the panels of Commissioners, stated more than once in the Rules, including in article 36, subparagraph (b), which provides that a panel of Commissioners may request additional information from any other source;

(ii) Make assessments of claims by seeking the assistance of valuation and other experts, which is one of the basic, objective duties and responsibilities of the panels of Commissioners. If the secretariat made an objective assessment of the claims, why should the panels of Commissioners need to do it? The answer to this question shows us the goal the secretariat seeks to achieve, namely, the use of the principle of analogy and the procedures in order to assess the majority of the claims. It also intends to make it difficult for the panels of Commissioners to make these assessments, which they can only sanction, by exerting pressure on them, using the pretext that time is limited under the schedules set out in the programme. In effect, this will lead to the sanctioning by the panels of Commissioners of the assessments made by the secretariat of thousands of claims involving tens or hundreds of billions of United States dollars. The panels of Commissioners will be left with a small and restricted number of claims that will be dealt with in accordance with the procedures currently set out in the Rules. All this will take place without the help of any information from the Iraqi Government and without even the minimal involvement of the Government in the settlement of claims. The relevant Security Council resolutions provide for a different, legal set of procedures, as decided by international law and no other system. What has been proposed in the new programme does not conform to the rules of international law. The Government of Iraq has discussed this aspect of the subject in detail on many previous occasions, as the Governing Council must be aware.

The secretariat submitted this work programme to the Governing Council of the United Nations Compensation Commission at its twenty-fifth session as though it were a simple organizational and administrative act aimed at completing the claims-settlement operation within five years. However, it is clear that the contents of the programme do not conform to international law, which was the basis for determining responsibility for the compensation provided for in Security Council resolution 687 (1991), to which Iraq agreed. The new programme aims to put in place new procedures concerning the relationships between the secretariat and the panels of Commissioners, the Commission and the claimants, and the Commission and legal experts (which the secretariat proposes to appoint). More importantly, it eliminates even the smallest opportunity for the Government of Iraq to respond to allegations made in claims, participate in hearings, voice in any way its legal and objective opinion or respond to exaggerated claims.

Iraq has already set forth its position on the mechanism for the settlement of claims embodied in the United Nations Compensation Commission, and on the manner in which it contravenes the rules of international law, cooperation between States, the principles of public law and the concepts of justice and equity on which those rules are based. I am sure you are aware that in August 1996 Iraq set forth its position in detail in the form of a procedural request to one of the panels of Commissioners while the case of the Kuwait Oil Company was under consideration. It also made its position clear to the Governing Council in November 1996. The Security Council was informed of this in document S/1996/893 of 31 October 1996.

That being the case, as is legally established, the procedure contained in the projected new programme prepared by the secretariat of the United Nations Compensation Commission constitutes an undue breach of international law with respect to the existing compensation mechanism and an ever greater denial of the rules of justice and equity.

The Government of Iraq, in bringing this matter to your attention, pursuant to your responsibilities under the Charter, considers that it would be a serious matter if such a programme was adopted, exceeding as it does the mandate of the secretariat or even of the Governing Council of the United Nations Compensation Commission. Iraq requests that all incorrect practices that contravene the principles of international law should be reviewed. It further requests that, to the extent that the matter concerns the Compensation Commission in particular, the accuracy of claims be verified and scrutinized in a manner fully consistent with international law, cooperation between States and the rules of justice and equity. If this is not done, the issue of compensation will become, as it already has in many ways, nothing more than an organized operation to strip the Iraqi people of their property such as has never before been witnessed in international affairs.

(Signed) Mohammed Said AL-SAHAF
Minister for Foreign Affairs
of the Republic of Iraq